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Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,
Petitioners,

v.

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendants similarly situated.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 50 F. Supp. 700. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 144 F. (2d) 292.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit which Petitioners seek to have reviewed was filed on August 10, 1944 (R. 482). The petition for a writ

of certiorari was filed herein on September 1, 1944 and was granted by order of this Court filed November 6, 1944, limited to question (h) presented by the petition (R. 483).

The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925.

Question Presented

Whether Section 16(b) of the Fair Labor Standards Act (52 Stat. 1069, 29 U. S. C. Sec. 216(b)) in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorney's fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case, Section 480 of the New York Civil Practice Act.

Pertinent Provisions of Statutes Involved

FAIR LABOR STANDARDS ACT OF 1938

Sec. 7(a)

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

'(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

'(2) for a workweek longer than forty-two hours during the second year from such date, or

'(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his

employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Sec. 16(b)

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

New York Civil Practice Act

Sec. 480

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

Statement

(a) Parties and Proceedings

Petitioners are domestic corporations, organized and existing under the laws of the state of New York and maintaining places of business in the City, County and State of New York. Petitioner, Arsenal Building Corporation, is the owner of a loft building known as the "Arsenal Building", located at 463 Seventh Avenue, New York City; petitioner, Spear & Co., Inc., acts as agent in managing the building owned by Arsenal Building Corporation (R. 25-26).

Respondent is now and was during the period embraced by this action, an elevator operator in the Arsenal Building (R. 26). Respondent commenced this action on August 13, 1942, in behalf of himself and 25 other building service employees of the Arsenal Building similarly situated, in the United States District Court for the Southern District of New York. Respondent sued under Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime wages allegedly due respondent and the other employees under Section 7(a) of that Act for their respective periods of employment between October 24, 1938, the effective date of the Act, and February 5, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

Petitioners' answer admitted (R. 10) that respondent was covered by the Act, this Court in *Arsenal Building Corp.* v. *Walling*, 316 U. S. 517, decided June 1, 1942, having so held with respect to all the employees here involved and having issued its mandate directing petitioners to refrain from future violations of the Act. In addition, petitioners pleaded several affirmative defenses and an equitable counterclaim predicated upon the fact that the entire em-

ployment of respondent and the other employees had been governed by collective bargaining agreements between the parties and upon their conduct under those agreements.[1]

The nature of the defenses interposed by petitioners is not now material in view of the limited nature of the review granted by this Court.

Trial of the action was had before the Honorable Henry W. Goddard, District Judge of the United States District Court for the Southern District of New York, during February, 1943. Judge Goddard filed an opinion on July 12, 1943 (R. 464-472) sustaining respondent's claim and judgment (R. 454-456) was entered on October 26, 1943 pursuant to findings of fact and conclusions of law (R. 25-36). The judgment entered against both petitioners in favor of respondent and the other employees similarly situated, totaled $13,692.46, consisting of $5,379.58 for overtime compensation and an additional equal amount of $5,379.58 for liquidated damages, $2,151.80 representing averaged interest at 6% upon the total recovery of overtime compensation and liquidated damages from the midpoint in the period of employment, October 24, 1938 through February 5, 1942, to the date of the entry of judgment, $750.00 attorneys' fees and $31.50 costs and disbursements. Interest on the overtime and liquidated damages had not been prayed for in the complaint and was not included in the original judgment entered on October 26, 1943. However, the original judgment was amended *nunc pro tunc* by order dated February 5, 1944 (R. 462-463).

Appeals were thereupon taken by petitioners and respondent to the United States Circuit Court of Appeals

[1] In the previous action of *Arsenal Building Corp.* v. *Walling*, 316 U. S. 517, the construction and effect of these collective agreements was not litigated. The sole issue was coverage. Petitioners' counsel in that action (Transcript of Record, p. 27) admitted "for the purpose of this suit only that they are not and have not been conformed to the provisions of Section 7 of the Fair Labor Standards Act * * *."

for the Second Circuit (R. 473, 474). Petitioners appealed from the judgment in its entirety; respondent only from that part of the judgment granting him a counsel fee of $750.00 on the ground that such fee was insufficient. On July 18, 1944, the Circuit Court modified the judgment of the District Court by increasing the attorneys' fee allowed the respondent to $1,250.00, but otherwise affirmed the judgment (R. 479-482).

On August 2, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholding its mandate in this case for a period of 30 days, pending this application by your petitioners for a writ of certiorari to said Court.

(b) Relevant Findings

Respondent and the other employees on whose behalf he sued were all members of Local 32-B, Building Service Employees International Union, A. F. of L. (called the Union herein) and were employed continuously under various collective bargaining agreements (R. 31-32).

Between Oct. 24, 1938, the effective date of the Act and June 1, 1942, the date of this Court's decision in *Arsenal Building Corp.* v. *Walling*, 316 U. S. 517, no claim was ever made to petitioners by respondent and the other employees or by their Union for additional wages under the Act (R. 33-34).

There was neither bad faith nor wilful violation of the Act by petitioners (R. 29).

The full amount of the overtime due respondent and the other employees similarly situated for the period October 24, 1938 to February 5, 1942, as determined by the Wage and Hour Division of the United States Department of Labor, was offered to respondent and the other employees before commencement of the action and refused (R. 29).

Specification of Error

The Circuit Court erred as follows:

In holding that the judgment for respondent and the other employees should include interest on both overtime and liquidated damages from the respective dates when overtime compensation became due to the date of entry of judgment.

Summary of Argument

The legislative history, administrative interpretation and general canons of construction, especially as reflected in other statutes involving comparable questions, demonstrate that Congress intended to formulate by Section 16(b) of the Act, a complete, uniform and exclusive measure of damages for violation of the Act. Interest pursuant to state law cannot therefore be added to any recovery under Section 16(b) since the Federal Act is paramount.

ARGUMENT

I

By Section 16(b) of the Act Congress formulated a complete, uniform and exclusive measure of damages governing employees' suits in all courts.

The question presented involves the construction and application of a federal statute. Its answer is therefore governed by federal rather than state law. "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy,

conflicting state law and policy must yield." *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245; *Deitrick* v *Greaney*, 309 U. S. 190, 200; *Board of County Commissioners*, v. *United States*, 308 U. S. 343, 349-50.

This principle applies even "in the absence of an applicable federal statute" where federal rights are at stake. Thus, in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296, this Court held that it was for the Federal courts to determine "according to their own criteria," the rule governing interest to be recovered as damages for delayed payment of a contractual obligation to the United States.

In determining the extent of the damages to be awarded employees in civil actions against their employers for violations of the Fair Labor Standards Act, particularly whether or not interest shall be part of the recovery before judgment, there is no need for federal courts to search for and apply their own criteria. Congress itself has laid down the rules. "The provisions of the Act of Congress are the limits of liability which can be imposed on an employer." *Campbell* v. *Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942).[2]

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[2] In this case, the Supreme Court of Alabama said:

"For the purpose of another trial, we should say, under the holdings of Supreme Court of the United States, the compensation by way of liquidated damages for failure to pay minimum wages under sections 6(a) and 7(a) of the Act, 29 U. S. C. A. sections 206(a), 207(a), is not a penalty or punishment of the government—*Overnight Motor Transportation Co., Inc.* v. *Missel, supra*. In our opinion interest should not be computed on the double payment for overtime work authorized by the Act of Congress. That is to say, the provisions of the Act of Congress are the limits of liability which can be imposed on an employer. The justice of this holding is dictated by the difficulty of the employer to ascertain whether or not his business is within or without the Act of Congress."

(*continued on opposite page*)

(a) Legislative History of the Act

The legislative history with reference to Section 16(b) of the Act is meager. Such as it is, it points unerringly to the conclusion that Congress had no thought that an employee's recovery for violation of the Act would be more than twice the amount of wages withheld plus an attorney's fee and costs. Under the heading "Penalties," the Conference Report said:

> "* * * This section also provides for civil reparations for violations of the wages-and-hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received." (83 Cong. Rec. 9255, 1938).

During the final debate in the House, Representative Keller, himself a member of the Conference Committee, stated in part:

> "Among the provisions for the enforcement of the act an old principle has been adopted and will be ap-

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Apart from the *Campbell* case, we are not aware of any other appellate decisions discussing the problem of interest under Section 16(b) except that of the Second Circuit Court of Appeals in the instant case and of the New York Court of Appeals in *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 293 N. Y. 126, 129-30; now Docket No. 462 and assigned for argument with this case. Of lower court decisions, Judge Rifkind's opinion in *Berry* v. *34 Irving Place Corp.*, 7 Wage and Hour Reporter 682 (S. D. N. Y., June, 1944), is worthy of mention. After distinguishing the cases relied on by Judge Leibell in *Rigopoulos* v. *Kervan*, 53 F. Supp. 829 (S. D. N. Y., Nov. 1943), Judge Rifkind says in part:

> "The statutory provision of the Fair Labor Standards Act for liquidated damages is designed to compensate for the damages resulting from the retention of the workman's pay * * * which otherwise might be 'too obscure and difficult of proof.' Nothing in the statute suggests anything but a legislative intention to provide a uniform rule as to such damages, a rule in no way dependent upon the varying standards and provisions of the several states."

plied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. * * *" (83 Cong. Rec. 9264, 1938).

(b) Administrative Interpretation

The Administrator who is charged with enforcement of the Act and whose interpretations, even though informal, have been accorded great weight by this Court (*United States* v. *American Trucking Associations*, 310 U. S. 534, 549; *Skidmore* v. *Swift and Company*, —— U. S. ——, Docket No. 12, decided December 4, 1944), has never considered interest on wages withheld or on the additional equal amount of liquidated damages as a part of the employee's right of recovery for violations.

In a pamphlet issued in 1938 by the U. S. Department of Labor entitled "A Ceiling for Hours, A Floor for Wages and a Break for Children—An Explanation of the Fair Labor Standards Act of 1938" (U. S. Government Printing Office, 1938), it is said (page 13):

> "Employees may bring suit themselves or through an agent in any court of competent jurisdiction to recover unpaid minimum wages or unpaid overtime compensation. Employers violating the wage or hour requirements are liable for unpaid sums plus an equal amount as damages, court costs, and reasonable attorneys' fees."

In another brochure published by the U. S. Department of Labor, Wage and Hour Division, entitled "The Wage and Hour Law—What It Is" (U. S. Government Printing

Office, 1941), the following statement appears at page 9:

> "To make the law partially self-enforcing, Congress provided that any worker whose employer violated the law could sue him in court and collect double any back wages illegally withheld plus an attorney's fee and court costs."

A special brochure published by the Wage and Hour Division and circulated among employees and labor organizations under the title "Workers—How the Wage-Hour Law Affects You" (U. S. Government Printing Office, 16-10316), advises in question and answer form as follows (page 10):

> "Q. Can I collect back wages?
>
> "A. You are entitled to sue your employer in court. If violation of the law is proved, *your employer may be compelled to pay you twice the amount due, plus court costs and a reasonable attorney's fee.*" (Emphasis theirs.)

Employers were similarly advised in an "Employers' Digest of the Fair Labor Standards Act of 1938" (U. S. Government Printing Office, 16-10292). It was explained that "This digest has been prepared as a guide to employers' responsibilities under the Fair Labor Standards Act of 1938." Under the heading "Penalties" on page 4, it is said:

> "Employers violating the wage and hour requirements are liable for double the unpaid sums plus court costs and reasonable attorney's fee."[3]

The most significant manifest of the Administrator's interpretation of the Act with respect to interest has been his

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[3] Similar characterization of the employee's rights and the employer's liability appear in the Annual Reports of the Wage and Hour Division. See, for example, Annual Report, 1940, page 95; Annual Report, 1941, pages XIII and 51-52.

policy in restitution cases. Through amicable arrangements or by litigation often culminating in consent decrees, the Administrator has required employers to make restitution of back wages illegally withheld (for the procedure in restitution cases, see Annual Report, Wage and Hour Division, 1940, pp. 87, 89-90). From the effective date of the Act in October, 1938, to October, 1943, the cumulative total of such restitutions was approximately $55,000,000, covering 1,500,000 workers in 70,000 establishments. (Annual Report, Wage and Hour and Public Contracts Divisions, 1942-1943, mimeograph p. 9.)

We are aware of no reported case where the Administrator has required the payment of interest upon restitution of back wages to employees, and have been advised by attorneys for the Wage and Hour Division that it has never been the practice of the Division to do so.

The Administrator's published interpretation of employee rights and employer obligations under Section 16(b), as well as his consistent practice in restitution cases, bespeak the Administrator's belief as one "charged with the responsibility of setting its machinery in motion" that the Act confers no right of interest on withheld wages. This is more than negative construction and, though not, it would still be significant. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, footnote at pages 580-81.

(c) General Canons of Interpretation; Comparable Questions Under Other Federal Statutes

If Congress had merely authorized employees to sue in any court of competent jurisdiction for wages unlawfully withheld under Sections 6 and 7 of the Act, this Court would undoubtedly hold, in accordance with established federal criteria, that interest may be allowed from the date when the wages should have been paid even though the Act were silent as to interest and even though no other applicable federal statute permitted it. This on the prin-

ciple that interest is generally allowed "for damages caused by delay in discharging a duty and therefore in default on a contract to pay money."[4] *Billings* v. *United States*, 232 U. S. 261, 284-288; *cf. Board of County Commissioners* v. *United States*, 308 U. S. 343, 352; *Faber* v. *City of New York*, 222 N. Y. 255, 262, 118 N. E. 609 (1918).

But in enacting Section 16(b) Congress did more than merely authorize suits for wages unlawfully withheld under Sections 6 and 7. Instead of relying on the courts to apply the general rule and award interest as damages for failure to pay money, Congress expressly stated its own rule of damages for violations of the duties created by Sections 6 and 7. Thus it said that the infringing employer "shall be liable" for the unpaid wages and "in an additional equal amount as *liquidated damages.*" (Emphasis ours.) See *Guess* v. *Montague*, 140 F. 2d 500, 505 (C. C. A. 4, 1943).

Instead of interest which might conceivably vary from state to state even under a federal rule (See opinion of Black, J. dissenting in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 298), Congress decreed a uniform rule of liquidated damages equal in amount to the unpaid wages. Moreover, Congress had another reason for a definite rule of damage as suggested by this Court in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583-584, where it was

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[4] It is interesting to note that there are few cases, if any, involving orders for reinstatement with back pay under the National Labor Relations Act, 29 U. S. C. 160(c) where the employer has been ordered by the Board to pay interest on backpay. This involves a situation analogous to that assumed above. Presumably this Court would sustain an award of interest if the Board found that it would "effectuate the policies" of the Labor Act. *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539. But *cf. Corning Glass Works* v. *National Labor Relations Board*, 129 F. (2d) 967, 973 (C. C. A. 2, 1942) where the Court itself allowed interest after the date of the Board's order on sums found due by the Master in contempt proceedings.

said: "The wages were specified for him by the statute, * * *. The liquidated damages for failure to pay the minimum wages under Sections 6(a) and 7(a) are compensation, * * *. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

Having established a rule of damages for failure to pay wages which would, in effect, include interest and make whole the loss ordinarily compensated by interest, it is not reasonable to assume that Congress intended that damages be further aggravated by piling interest upon interest. Compounding of interest is not favored in the absence of contract or statute. *Cherokee Nation* v. *United States*, 270 U. S. 476, 490; But *cf. L. & N. R, R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 240 where it was pointed out that the compounding of interest there attacked was equivalent to the compounding normally incident to the allowance of interest on an award.[5]

Examination of various multiple damage acts reveals no instance where interest has been allowed. (Sherman Act, 15 U. S. C. 15; Seamen's Act, 46 U. S. C. 596; Emergency Price Control Act, 58 Stat. 640, 50 U. S. C. A.

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[5] Interest allowed by the Interstate Commerce Commission and sustained by this Court in actions under the Interstate Commerce Act (49 U. S. C. 8 and 16) provide an interesting contrast. Section 8 makes the carrier liable "for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court * * * and collected as part of the costs in the case." In justifying the Commission's long established practice of allowing interest, this Court said in *Pennsylvania R. R. Co.* v. *Minds*, 250 U. S. 368, 370-71: "For years these claims have been contested, the Company never offered any payment of the awards, and unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute." Obviously this reasoning does not apply to a statute such as Section 16(b) where Congress has expressly prescribed the measure and extent of damages for violation of a statutory duty.

App. 925).[6] Interest from the date the cause of action accrued has been consistently denied under a state treble damage statute. *Blair* v. *Sioux City & P. Ry. Co.*, 73 N. W. 1053, 1058 (Iowa, 1898, not officially reported).

Presumably Congress enacted Section 16(b) with the general state of the law in mind. *Cf. Hecht Co.* v. *Bowles*, 321 U. S. 321, 329. In this light the express provision for liquidated damages and the silence as to interest have dual significance: substitution of a definite rule of damage in lieu of interest on unpaid wages which would generally be awarded and avoidance of interest on the double damages by silence in accordance with the general rule. Moreover, the final direction that the courts—state or federal—shall allow a reasonable attorney's fee and costs of the action in addition to any judgment for damages awarded to the employee, points up the Congressional intention to exclude interest. Attorneys' fees and court costs are distinctly incidents of litigation normally within the control of the State creating the court (*cf* Frankfurter, J., concurring in *Brown* v. *Gerdes*, 321 U. S. 178, 190). Congress did not seek to control the amount of fees or costs, but knowing these are matters of procedure which state courts having concurrent jurisdiction could wholly deny, Congress protected employees by specifically requiring such allowances.

Interest, on the other hand, is a matter of substance. *Louisiana & Arkansas Ry. Co.*, v. *Pratt*, 142 F. 2nd 847, 849 (C. C. A. 5, 1944); *Kiefer* v. *Grand Trunk R. Co.*, 12 App. Div. 28, 32; Conflict of Laws, Restatement, Sections 412(a) and (b); Goodrich, Conflict of Laws, Section 91. *Cf. Barnes Coal Corp.* v. *Retail Coal Merchants Association*, 128 F. 2d 645, 648 (C. C. A. 4, 1942). As the

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[6] Interest is not generally allowed on damages in patent cases until filing of the Master's report. *Duplate Corp.* v. *Triplex Co.*, 298 U. S. 448, 459.

formulator of the *lex loci,* Congress could have provided that the courts—state or federal—entertaining actions under Section 16(b) should award interest in accordance with the law of the forum. Having provided expressly for liquidated damages and having remained silent as to interest, interest must be deemed to have been excluded. *Expressio unius est exclusio alterius.*

The decision of the Fifth Circuit Court in the recent case of *Louisiana & Arkansas Ry. Co.* v. *Pratt, supra,* is particularly apposite. There Judge Holmes speaking for the court said in part (p. 848):

> "In all actions for personal injuries brought under the Federal Employers' Liability Act, the remedy given by that statute is exclusive, and all state laws are superseded in so far as they attempt to cover the same field. At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained. This was upon the theory that no debt was due prior thereto or that interest was a part of the damages and was merged therewith in the amount awarded.
>
> "The Act itself contains no provision with respect to interest, and the measure of damages in actions under it, being inseparably connected with the right of action created, must be settled according to general principles of law as administered in the federal courts at the time of enactment, except as modified by Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.
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> "The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict. Since the Act is exclusive, state statutes upon the measure of damages, including Louisiana Act 206 of 1916, are superseded in so far as they are in conflict."

A similar result was reached under the Jones Act (46 U. S. C. 688) in *Cortes* v. *Baltimore Insular Line*, 66 F. 2d 526 (C. C. A. 2, 1933).[7]

The Fair Labor Standards Act was intended to establish a basic and uniform national policy with respect to minimum wages and maximum hours (*Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local*, 321 U. S. 590, 602). This intention ought to govern its construction and application throughout unless otherwise indicated. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245; *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *cf.* dissenting opinion of Black, J., in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296.

Obviously the desirable uniformity cannot be achieved if interest is to be allowed under Section 16(b) in accordance with the varying laws of the states.[8]

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[7] Reference should be made to cases in which this Court has denied interest on special claims against the Government where the enabling acts are silent on the subject. *United States* v. *Goltra*, 312 U. S. 203, 207-211; *Tillson* v. *United States*, 100 U. S. 43, 46.

[8] An interesting illustration of the possible diversity of results is the "portal to portal" situation in the Bituminous Coal Industry. If this Court should affirm the ruling of the Fourth Circuit Court in *Jewell Ridge Coal Corp., petitioner* v. *Local No. 6167*, Docket No. 721, it is not unlikely that miners working under the same or similar collective agreements will bring actions under Section 16(b) for back wages on the travel time theory. Bituminous coal is mined in 31 states and Alaska. In at least one bituminous coal state, Alabama, interest would be denied under state law since the Alabama Supreme Court in *Campbell* v. *Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942) indicated an alternative ground for its decision, that the local laws did not provide for interest in such a case. Because of the paucity of rulings on this subject it is difficult to predict what the rule would be in other states.

II

Interest before judgment, pursuant to State law, may not be added to a recovery under Section 16(b) of the Act, since the latter establishes a paramount and exclusive measure of damage.

The principle invoked is established by a long line of cases:

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 245;

St. Louis S. F. & T. R. Co. v. *Seale*, 229 U. S. 156;

Louisiana & Arkansas Ry. Co. v. *Pratt*, 142 F. (2d) 847, 849 (C. C. A. 5, 1944);

Murmann v. *N. Y., N. H. & H. R. Co.*, 258 N. Y. 447 (1932).

Conclusion

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court of Appeals for the Second Circuit should be modified by eliminating interest in the sum of $2,151.80 allowed on the recovery of overtime wages and liquidated damages before judgment.

Respectfully submitted,

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Dated: January, 1945.